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April 15, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: September 16, 2004

Case No.: TIA-0204

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant

appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a scientist at DOE's Hanford site (the site) for nearly 40 years. The Applicant filed an application with OWA, requesting physician panel review of one illness - rectal cancer.

The Physician Panel rendered a negative determination on the claimed illness. The Panel examined the record and determined that the only toxin present at the site which could be related to the Applicant's illness was radiation. The Panel determined that the Applicant's dosimetry recordings for his entire career, with the exception of one year, were "either negligible or within accepted limits." See Panel Report at 1. Consequently, the Panel determined that the Applicant's occupational exposures were insufficient to have caused, contributed to, or aggravated his illness.

The OWA accepted the Physician Panel's determination on the claimed illness. The Applicant filed the instant appeal.

The Applicant presented several arguments in his appeal. First, the Applicant argued that the panel report contained a statement by the Applicant, made during a physical examination, that although he worked with radioactive materials he did not consider his job hazardous. The Applicant contends such a statement has no bearing on whether radiation exposure was a factor in his illness and that it appeared that the statement "may have had a significant influence on the physician's evaluation." See Applicant's Appeal Letter. Second, the Applicant contends that the fact that radiation exposure is within accepted limits does not preclude it being a "causative factor in cancer induction." *Id.* Third, the Applicant contends that the means of preventing, detecting, and measuring radiation exposure have significantly improved in the 40 years since he began working at the

site and, therefore, it is possible that the dosimetry recordings do not present an accurate estimate of his radiation exposure. The Applicant notes that a National Institute for Occupational Safety and Health (NIOSH) dose reconstruction report was not completed prior to the Panel's review of his claim.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

It is undisputed that the Panel considered the claimed illness, determined that it was not related to toxic exposures at DOE, and explained the basis of the determination. In making its determination, the Panel applied the correct standard, *i.e.*, "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to, or causing the illness." See Panel Report at 1; 10 C.F.R. 852.8.

The Applicant's arguments do not indicate Panel error. First, the Panel did not rely on the Applicant's statement that his job was not hazardous. Instead, the Panel relied on the Applicant's exposure records. Specifically, the Panel found the Applicant's occupational exposure to radiation was too low to have been a significant factor in causing, contributing to, or aggravating the Applicant's illness. There is nothing in the Panel report to indicate that the Panel would have arrived at a different conclusion absent the Applicant's statement that his job was not hazardous. Second, the Applicant's argument that low radiation exposure may be a "causative factor in cancer induction" is a mere disagreement with the Panel's medical judgment, not an indication of Panel error. Third, the Applicant's argument that the dosimetry record may not reflect the extent of his exposure does not indicate panel error since the Panel bases its determination on its review of the exposure data in the record. We note that the NIOSH dose reconstruction report, which was not completed at the time the Applicant's claim was reviewed by the Panel, may provide further information that would support the Applicant's claim.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0204 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 15, 2005